

STATE OF MICHIGAN  
IN THE SUPREME COURT

SHARDA GARG,  
Plaintiff-Appellee  
and Cross-Appellant,

v

MACOMB COUNTY COMMUNITY  
MENTAL HEALTH SERVICES, a  
governmental agency of MACOMB  
COUNTY,

Defendant-Appellant  
and Cross-Appellee.

Supreme Court  
No: 121361

Court of Appeals  
No.: 223829

Macomb County Circuit Court  
No.: 95-3319 CK

*Original*

121361-  
**SUPPLEMENTAL BRIEF IN SUPPORT OF  
APPLICATION FOR LEAVE TO APPEAL BY  
MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES**

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## INTRODUCTION

Defendant Macomb County Community Mental Health Services has pending before this Court an application for leave to appeal (filed April 18, 2002), in which defendant seeks peremptory reversal of, or leave to appeal from the March 29, 2002, decision of the Court of Appeals (Griffin, P.J., and Meter and Kelly, JJ.), affirming the judgment for plaintiff Sharda Garg in the amount of \$354,298.17. Plaintiff has also filed an application for leave to appeal as cross appellant seeking to challenge Judge Olzark's post-verdict determination that interest runs on a portion of the award from the date of judgment (rather than the date of the complaint), because the verdict contained future damages within the meaning of MCL 600.6013. and MCL 600.6301.

The underlying judgment was entered on August 17, 1998, by the Honorable George Montgomery on a jury verdict of \$250,000, following a trial before the Honorable Roland Olzark in 1998 (Tr 4/1/98 through 4/23/98). By a special verdict, the jury found in this action for discrimination and/or retaliation under the Elliott-Larsen Civil Rights Act that Macomb County Community Mental Health Services had not discriminated against Ms. Garg based on her national origin.

The jury further found, however, that defendant had retaliated against plaintiff between 1983 and 1995 for engaging in activities protected by the Elliott-Larsen Civil Rights Act. Based on the special verdict, which was tailored to plaintiff's theories at trial, the protected activity for which the jury found plaintiff was retaliated against was either plaintiff's alleged "opposition" to sexual harassment by slugging her supervisor, Donald Habkirk, in 1981, or plaintiff's complaint, in a union grievance, of national origin discrimination by Kent Cathcart made in 1987 (verdict form, exhibit C to application).

(Although plaintiff complained that she had unsuccessfully interviewed with a plethora of individuals for 18 promotions or transfers, the only individuals she claimed to have retaliated against her were Donald Habkirk and Kent Cathcart (Tr 4/7/98, p 544).)

By order of December 29, 2003, this Court has directed that this matter be scheduled for oral argument pursuant to MCR 7.302(G)(1). The Court further has permitted the parties to file supplemental briefs within 28 days.

This supplemental brief is submitted by Macomb County Community Mental Health Services to provide a comprehensive discussion of pertinent authorities not addressed in its application (two of which were more briefly addressed by defendant in Supplemental Authorities previously filed with the Court), as well as to reply as necessary to arguments raised by plaintiff in her response to the application.

## ARGUMENT

### **I PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE ELLIOTT-LARSEN CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW (OR AT A MINIMUM, A NEW TRIAL).**

Plaintiff's proofs, as opposed to the argument of plaintiff's counsel, were not sufficient to establish a prima facie case of retaliation by defendant in violation of the Civil Rights Act. See Pena v Ingham County Road Commission, 255 Mich App 299; 660 NW2d 351 (2003) (reiterating the four elements of a retaliation claim--(1) that plaintiff was engaged in protected activity; (2) that this was known to defendant; (3) that the defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action).

With respect to the 1981 incident involving Mr. Habkirk, and the first and second elements of a retaliation claim, nothing in the proofs supports an inference that plaintiff was, or was perceived by defendant to be, engaged in protected activity when she silently slugged Mr. Habkirk in 1981. As plaintiff notes (response to application, pp 8-9), physically rebuking or slugging a sexual harasser at the time of and in response to what is perceived by both individuals to be a sexually inappropriate contact or an act of sexual harassment may give rise to a reasonable inference of engagement in, or notice of engagement in, protected activity. However, that simply is not what occurred here.

Plaintiff's counsel repeatedly stipulated that Mr. Habkirk never sexually harassed Sharda Garg herself (opening at Tr 4/1/98, pp 16-18, closing at Tr 4/22/98, pp 66, 68-69, 74, 113-114, argument on directed verdict motion at Tr 4/8/98, pp 807-810). Plaintiff

never testified that she believed Mr. Habkirk was touching her inappropriately or sexually harassing her when he tapped her on the shoulder.

Plaintiff's counsel claimed that Ms. Garg was opposing sexual harassment by Mr. Habkirk of other employees based on two specific incidents Ms. Garg testified she observed. However, over five days of direct examination plaintiff herself never testified she was, or believed herself to be, opposing sexual harassment (by or of anyone) when she reflexively swatted Mr. Habkirk. Ms. Garg could not even state whether her slugging of Mr. Habkirk occurred after, or before, those two incidents with other employees (Garg, Tr 4/1/98, pp 125-126).

Contrary to plaintiff's argument, the mere fact or nature of the silent Habkirk incident, as described by plaintiff, was not sufficient to show that Sharda Garg was, or was perceived by Mr. Habkirk to be, engaged in protected activity. As set forth in defendant's application, with specific citations to the record, plaintiff repeatedly conceded she never mentioned this incident with Mr. Habkirk to anyone at Macomb County. Those involved in the promotion process all likewise indicated they had no knowledge of the incident.

This Court's decision in West v Reeves, 469 Mich 177; 665 NW2d 468 (2003) provides further support for defendant's position that plaintiff here failed to establish a prima facie case of retaliation under either of her theories because, inter alia, she failed to show a causal connection between alleged protected activity (slugging her supervisor in 1981, or complaining in a union grievance of, among other things, national origin discrimination in 1987), and adverse employment actions by defendant. The adverse employment actions were claimed to be the denial of various promotions or transfers

from 1983 to 1995, and instances of poor treatment or "harassment" by supervisors beginning in 1992.

In West (previously addressed briefly by defendant in a Supplemental Authority), plaintiff alleged he engaged in activity protected by the Whistleblower's Protection Act when he made a police report on May 4, 1997, regarding an alleged assault by a coworker. Plaintiff characterized one supervisor as nonchalant when being advised he had made a report, and the other as appearing "upset" that the altercation had occurred.

On May 22, 1997, plaintiff in West overstated his overtime, for which he was disciplined in June, 1997. In October 1997, plaintiff again overstated his overtime for which he was terminated in January 1998. He then filed a Whistleblower's suit claiming that after the police report he was treated differently by his supervisors and retaliated by the discipline and termination.

The Court's analysis in concluding that plaintiff in West failed to come forth with evidence supporting the causation element of his Whistleblower claim applies with even greater force to the record in this matter. As with both of Sharda Garg's retaliation claims in this matter, there "is nothing more than pure conjecture and speculation to link plaintiff's [opposition to sexual harassment by slugging Mr. Habkirk in 1981, or pursuing a grievance based on, inter alia, national origin discrimination in 1987] to any subsequent adverse employment action." West, slip opinion, p 12. Here, as in West, to "prevail, plaintiff had to show that [her] employer took adverse employment action because of plaintiff's protected activity, but plaintiff has merely shown that [her]

employer [failed to promote or harassed her years] after the protected activity occurred."

West, slip opinion at p 9.

Further, here as in West, the evidence does not show that either of plaintiff's supervisors with respect to whom plaintiff engaged in protected activity, Mr. Habkirk or Mr. Cathcart, viewed her alleged engagement in protected activity "as a matter of any consequence." West, slip opinion at p 9. Mr. Habkirk's alleged reaction was analogous to that of the supervisor in West, who was upset about the altercation but as to whom there was no evidence that he was concerned about the police report (the "protected" aspect of plaintiff's activity). While Mr. Habkirk allegedly became "cold" to plaintiff after the incident, plaintiff offered no proof that this was due to the alleged protected nature of her conduct, or simply a reaction to the fact of the silent assault itself.

This analysis is even more compelling as to the June 1987 grievance complaining of national origin discrimination, and alleged retaliation by Mr. Cathcart through the denial of promotions or transfers in and after 1989, and poor treatment from 1992 to 1995.<sup>1</sup> There was no evidence that Mr. Cathcart was upset, angry or even bothered by the June 1987 grievance. That grievance was just one of many grievances routinely filed by union members over the failure to obtain a requested promotion, and the third filed by Sharda Garg (Garg Tr 4/1/98, 182, Tr 4/2/98, pp 70, 75, Haack, Tr 4/14/98, pp 1187-1190).

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<sup>1</sup> The poor treatment of which Sharda Garg complained from 1992 to 1995, such as not being allowed to look at rainbows, was clearly so "trivial" (defendant's application, p 30), as not to be indicative of any adverse employment action by defendant. See Pena v Ingham County Road Commission, 255 Mich App 299 (2003).

There was no evidence of any statement by Mr. Cathcart (or anyone else) angry or critical about this third grievance--or more specifically about the protected activity in that grievance--the complaint therein of national origin discrimination, in particular.<sup>2</sup> Mr. Cathcart, in denying that he had ever retaliated against plaintiff for filing any grievance, or because of her national origin or skin color, could not even recall whether Ms. Garg had claimed in one of her grievances that she had been discriminated against based on her national origin (Cathcart, Tr 4/13/98, pp 1075-1080).

The Court of Appeals' rationale--"that plaintiff was denied *the first promotion that she sought after the filing of the grievance*" (emphasis by Court of Appeals, slip opinion p 3)--is defective even aside from the fact that there was a two-year gap between the grievance and the promotion denial: "Relying merely on a temporal relationship is a form of engaging in the 'logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this)' reasoning." West, n 10.

Moreover, the facts here stand in contrast to West, where, as noted by Justice Kelly, the plaintiff had a near perfect employment record and the employer had taken no action until after the whistleblowing/protected activity. Sharda Garg before this 1987 grievance (her third), consistently had been denied all prior 11 requested promotions or transfers over the past six years.

Here as in West, plaintiff clearly failed to establish the required causal connection between her alleged protected activity and the adverse employment actions of which

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<sup>2</sup> Plaintiff, for example, in pursuing the earlier February 1987 grievance had complained that she was discriminated against not because of her national origin, but because she was a female, a non-Caucasian, older and/or not a "behaviorist". (Haack, Tr 4/14/98, pp 1170-1171).

she complained. Plaintiff Sharda Garg failed to establish that she was not promoted, or was working under what she perceived to be less than ideal conditions because of, and in retaliation for her opposition to sexual harassment or complaint of national origin discrimination.

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**II ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE SHOULD NOT BE APPLIED TO AVOID THE PLAIN LANGUAGE OF THE STATUTE OF LIMITATIONS WITH RESPECT TO CLAIMS OF RETALIATION BASED ON THE SPECIFIC AND CONCRETE DENIAL OF 14 REQUESTS FOR PROMOTION MORE THAN THREE YEARS BEFORE THIS SUIT WAS FILED (FROM 1983 TO 1992).**

Even if the Court finds either or both of plaintiff's retaliation theories supported by the proofs, a new trial should nonetheless be granted because the vast majority of plaintiff's claims which the jury was permitted to consider were barred by the plain language of the three-year period of limitations. MCL 600.5805(1) and (9). Plaintiff should not have been permitted to assert claims under either retaliation theory based on the denial of promotions or transfers more than three years before suit was filed--before July 21, 1992.

The lower courts here relied on the continuing acts doctrine to permit plaintiff to proceed in a 1995 lawsuit on claims of retaliation extending back 12 years earlier to acts occurring in 1983. That doctrine, created by the federal courts in addressing the timeliness of Title VII claims, was first endorsed by this Court in Sumner v The Goodyear Tire and Rubber Co, 427 Mich 505; 398 NW2d 368 (1986). The doctrine should not be applied here.

First, this doctrine is in disregard of the plain language of the statute of limitations. A "person shall not bring an action to recover damages for injuries. . .after the claim first accrued" unless the action is commenced within three years (emphasis added). MCL 600.600.5805(1) and (9). A "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

(emphasis added) MCL 600.5827.

To disregard the plain language of these statutes, and allow a claim to be brought three to 12 years after the accrual/wrong (denial of promotion/transfer) is contrary to those fundamental principles of statutory construction as most recently re-embraced by this Court in Morales v Auto Owners Ins Co (After Remand), \_\_\_ Mich \_\_\_ (2003). In refusing to judicially "toll" or suspend judgment interest during appeal as not contemplated by the plain language of the judgment interest statute, the Court in Morales declared:

If the Legislature's intent is clearly expressed, no further construction is permitted. Helder v Sruba, 462 Mich 92, 99; 611 NW2d 309 (2000). Under such circumstances, a court is prohibited from imposing a "contrary judicial gloss" on the statute. In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc), 468 Mich 109, 119; 659 NW2d 597 (2003).

\* \* \*

The statute makes no exception for periods of prejudgment appellate delay. In the face of the Legislature's clearly expressed intent, this Court will not read such an exception into the statute. [Morales, supra.]

This Court likewise has refused to permit tolling of the statute of limitations in other contexts where to do so would conflict with the plain language of the statutes at issue. See Boyle v General Motors Corp, 468 Mich 226; 661 NW2d 557 (2003) (refusing to apply the discovery rule to extend the statute of limitations applicable to actions for fraud as to do so would violate the plain language of the accrual statute, MCL 600.5827), Secura Ins Co v AutoOwners Ins Co, 461 Mich 382; 605 NW2d 308 (2000) (holding that the doctrine of judicial tolling may not be applied to extend a statute of limitations in the absence of language in the statute itself allowing such tolling). The plain language of the statute of limitations does not allow tolling under a continuing acts rationale or otherwise.

Further, even if the plain language of the statute of limitations would permit tolling or extension of the statute of limitations in civil rights cases under some circumstances, this Court should endorse the clarification and limitation of the continuing acts doctrine set forth by the United States Supreme Court in National Railroad Passenger Corp v Morgan, 536 US 101; 122 S Ct 2061; 153 LEd2d 106 (2002), with respect to a claim, such as those asserted here, of discrete acts of retaliation.

In Morgan (previously addressed briefly by Supplemental Authority), the Supreme Court applied statutory construction principles like those in Morales, to hold in a Title VII case that the continuing violations doctrine does not apply to extend the statute of limitations with regard to discrete acts of retaliation or discrimination (as distinguished from claims of hostile work environment). This is precisely what has been argued here by defendant Macomb Community Mental Health Services (see application for leave to appeal, pp 36-42).

In Morgan, the federal Court of Appeals had applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to the act may also be considered for purposes of liability. The United States Supreme Court reversed, concluding that discrete retaliatory or discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. The Supreme Court in Morgan declared:

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and

retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, the only incidents that took place within the timely filed period are actionable . . . . All prior discrete discriminatory acts are untimely filed and no longer actionable. [National Railroad Passenger Corp v Morgan, supra, footnotes omitted, emphasis added.]

In Morgan, the Court concluded: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act."

In Sharpe v Cureton, 319 F3d 259 (CA 6 2003), the Sixth Circuit Court of Appeals applied the Morgan analysis to hold time-barred firefighters' claims under 42 USC 1983 of retaliation by virtue of unwanted job transfers for political support in violation of their First Amendment rights. The Court in Sharpe, supra, noted that "the continuing violation doctrine arose in the context of the 'obviously quite short deadlines set forth in Title VII, and the relatively longer limitations periods provided by states for § 1983 actions reinforces as a policy matter Morgan's applicability to these claims." Likewise, the three-year period of limitations here is many times the 300- or 180-day period under Title VII, reinforcing Morgan's applicability to claims under the Elliott-Larsen Civil Rights Act.

This analysis applies directly to bar plaintiff's claims based on the denial of 14 separate and distinct requests for promotion or transfer more than three years before this suit was filed.<sup>3</sup> At a minimum, Morgan and its progeny require reversal and

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<sup>3</sup> The Supreme Court in Morgan did indicate that the continuing violations doctrine would continue to apply to hostile environment claims, because they involve unlawful employment practices "which cannot be said to occur on any particular day, but occur over a series of days or years." Not only does defendant submit that this should not be followed in Michigan, but it has no factual application to this matter in any event. Plaintiff here did not assert any claim of hostile environment outside of the statute of

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remand for a new trial limited to claims based on acts of retaliation occurring within the three-year statute of limitations period before the complaint was filed.

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limitations (plaintiff identified the perceived instances of unpleasant treatment by Mr. Cathcart and/or after her move to First North as occurring between 1992 and 1996 (Garg Tr 4/2/98, pp 104-106, Tr 4/3/98, pp 132-134).) In any event, as noted in the prior footnote, this alleged harassment was clearly so "trivial", as not to independently support a claim because it would not constitute an adverse employment action by defendant.

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**RELIEF REQUESTED**

WHEREFORE defendant Macomb County Community Mental Health Services respectfully requests that this Honorable Court peremptorily reverse the judgments below, or grant leave to appeal, and:

Direct the entry of judgment of no cause of action in favor of defendant.

In the alternative, and if the Court determines that there was sufficient evidence to support one of the two retaliation theories, defendant seeks a new trial as to that theory only. Defendant further requests that the Court directs that summary dismissal be granted as to claims based on acts more than three years before this suit was filed, as barred by the statute of limitations.

Respectfully submitted,

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